

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NTCH-WA, INC.,

Plaintiff,

v.

ZTE CORP.,

Defendant.

NO: 12-CV-3110-TOR

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS FOR LACK
OF PERSONAL JURISIDICTION
AND FOR FAILURE TO STATE A
CLAIM

BEFORE THE COURT is Defendant's Motion to Dismiss (ECF No. 103).

This matter was heard with telephonic oral argument on February 26, 2014.

Shannon Gallagher, Lisa J. Dickinson and Lisa M. Sofio appeared on behalf of the

Plaintiff. Laura E. Besvinick and Michael J. Kapaun appeared on behalf of

Defendant. The Court has reviewed the briefing and the record and files herein,

and is fully informed.

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BACKGROUND

Defendant ZTE Corp. moves to dismiss Plaintiff's Amended Complaint for lack of personal jurisdiction and for failure to state a claim. For the reasons discussed below, the Court concludes that personal jurisdiction over Defendant has been properly established and that each of Plaintiff's claims states a claim upon which relief can be granted.

FACTS¹

Plaintiff NTCH-WA, Inc., is a Washington corporation that maintains its principal place of business in Yakima, Washington. Plaintiff is one of a number of affiliated companies that does business under the trade name ClearTalk. Among other ventures, Plaintiff and its affiliates sell wireless telecommunications services.

Defendant ZTE Corp. is a corporation organized under the laws of the People's Republic of China and maintains its principal place of business in Shenzhen, China. Defendant manufactures and supplies telecommunications equipment, hardware, software licenses and related support services. Defendant

¹ The facts in this section are drawn principally from Plaintiff's Amended Complaint and the materials attached thereto and are accepted as true for purposes of the instant motion. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

1 sells its products in the United States through its wholly-owned subsidiary, ZTE
2 USA.

3 In September 2006, one of Plaintiff's ClearTalk affiliates in Florida ("PTA-
4 FLA") purchased equipment manufactured by Defendant through ZTE USA. This
5 equipment was to be used to build a cellular telephone network in Jacksonville,
6 Florida. Among the equipment PTA-FLA purchased was a primary switch² and
7 various "modules" designed to provide MMS data messaging capability.

8 After the equipment was delivered, PTA-FLA discovered that it would not
9 support several government-mandated services such as local number portability
10 and E-911 emergency assistance. PTA-FLA also discovered that the equipment
11 could not provide the promised MMS data messaging capability. PTA-FLA
12 worked with ZTE USA to resolve the issues, but was ultimately unsuccessful.

13 In an effort to mitigate their damages, PTA-FLA, ZTE USA and Defendant
14 negotiated an agreement to repurpose some of the equipment for use in other
15 markets by other ClearTalk entities. This agreement called for the primary switch
16 originally sold to PTA-FLA to serve as the hub of a network that would be located
17 in Jackson, Tennessee and used by ClearTalk affiliate NTCH-WEST TENN, INC.

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19 ² A primary switch is the core of a telecommunications network which routes calls
20 from the caller to another caller on the same network or to a different network.

1 The agreement also called for Plaintiff to build a spoke of the network in Yakima,
2 Washington that would connect remotely to the primary switch in Tennessee.
3 Under this network configuration, Plaintiff's portion of the network in Washington
4 would only function if the primary switch in Tennessee was functioning properly.

5 During the course of these negotiations, Plaintiff sought reassurances from
6 Defendant that it could resolve the outstanding issues with the primary switch and
7 render the Tennessee network hub operational in a timely manner. Defendant,
8 through several persons acting on its behalf, promised Plaintiff that the hub would
9 be operational before Plaintiff's contemplated launch date. Accordingly, Plaintiff
10 moved forward with plans to build out its portion of the network in Washington.

11 The implementation of the network hub in Tennessee did not go smoothly.
12 After ZTE USA was unable to make the equipment work properly, Defendant sent
13 an engineer from China to address the lingering problems. This engineer assured
14 Plaintiff that the problems could be fixed and that the primary switch would be
15 operational in time for Plaintiff's launch. In reliance upon those assurances,
16 Plaintiff purchased additional equipment which it needed to build out its portion of
17 the network. This equipment included a remote switch which Plaintiff purchased
18 from ZTE USA, and forty base stations which Plaintiff acquired by way of an
19 addendum to a separate contract between Defendant, ZTE USA and Daredevil,
20 Inc., a ClearTalk affiliate located in Missouri.

1 Ultimately, Defendant's engineer was unable to render the primary switch
2 operational. Consequently, Plaintiff's network could not be launched. Further
3 complicating matters, Plaintiff could not complete its portion of the network build
4 out because it received "incomplete" base stations from Defendant.

5 Plaintiff filed the instant lawsuit to recover damages caused by the botched
6 network launch. Plaintiff has asserted separate claims against ZTE USA which are
7 currently being litigated in binding arbitration. Defendant is not a party to the
8 arbitration proceedings.

9 DISCUSSION

10 **A. Personal Jurisdiction**

11 A motion to dismiss for lack of personal jurisdiction is governed by Federal
12 Rule of Civil Procedure 12(b)(2). In opposing such a motion, the plaintiff bears
13 the burden of establishing that jurisdiction is proper. *Mavrix Photo, Inc. v. Brand*
14 *Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2008). When the motion is "based on
15 written materials rather than an evidentiary hearing, the plaintiff need only make a
16 prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Id.*
17 (citing *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th
18 Cir. 2010)). To satisfy this standard, a plaintiff "need only demonstrate facts
19 that[,] if true[,] would support jurisdiction over the defendant." *Harris Rutsky &*
20 *Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003)

1 (quotation and citation omitted). In determining whether a plaintiff has made the
2 requisite showing, a court must accept all uncontroverted allegations in the
3 complaint as true and resolve any factual disputes in the plaintiff's favor. *Id.*

4 The term personal jurisdiction refers to a court's power to render a valid and
5 enforceable judgment against a particular defendant. *World-Wide Volkswagen*
6 *Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The exercise of this power is limited
7 by the Due Process Clause of the Fourteenth Amendment. In general, due process
8 requires that a non-resident defendant have sufficient "minimum contacts" with the
9 forum state such that requiring the defendant to defend in that forum would
10 comport with traditional notions of fair play and substantial justice. *Int'l Shoe Co.*
11 *v. Wash.*, 326 U.S. 310, 316 (1945).

12 Personal jurisdiction over a non-resident defendant may take one of two
13 forms: general jurisdiction or specific jurisdiction. *Bancroft & Masters, Inc. v.*
14 *Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). Here, Plaintiff has
15 attempted to establish specific jurisdiction. The following three-part analysis
16 controls:

17 (1) The non-resident defendant must *purposefully direct his activities*
18 or consummate some transaction with the forum or resident thereof; or
19 perform some act by which he *purposefully avails himself* of the
20 privilege of conducting activities in the forum, thereby invoking the
benefits and protections of its laws; (2) the claim must be one which
arises out of or relates to the defendant's forum-related activities; and

1 (3) the exercise of jurisdiction must comport with fair play and
2 substantial justice, i.e., it must be reasonable.

3 *Mavrix Photo*, 647 F.3d at 1228-29 (9th Cir. 2011) (emphasis in original)
4 (quotation and citations omitted). The plaintiff bears the burden of establishing
5 that the first two prongs have been satisfied. *CollegeSource, Inc. v. AcademyOne,*
6 *Inc.*, 653 F.3d 1066, 1076 (9th Cir. 2011). If the plaintiff is successful, the burden
7 shifts to the defendant “to set forth a ‘compelling case’ that the exercise of
8 jurisdiction would not be reasonable.” *Id.* (quoting *Burger King Corp. v.*
9 *Rudzewicz*, 471 U.S. 462, 476-78 (1985)).

10 The first prong of the specific jurisdiction test may be satisfied by either
11 “purposeful direction” of the defendant’s activities toward the forum state or
12 “purposeful availment” of the forum state’s laws. *Yahoo! Inc. v. La Ligue Contre*
13 *La Racisme et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc).
14 These are two distinct concepts, and courts must be careful to apply the correct test
15 based upon the type of claim(s) being asserted. *In re W. States Wholesale Natural*
16 *Gas Antitrust Litig.*, 715 F.3d 716, 743 (9th Cir. 2013). In tort cases, courts
17 typically inquire “whether a defendant ‘purposefully direct[ed] his activities’ at the
18 forum state[.]” *Yahoo! Inc.*, 433 F.3d at 1206 (citation omitted). In contract cases,
19 by contrast, courts typically ask “whether a defendant ‘purposefully avail[ed] itself

1 of the privilege of conducting activities’ or ‘consummate[d] a transaction’ in the
2 forum, focusing on activities such as delivering goods or executing a contract.” *Id.*

3 Plaintiff has asserted claims sounding in both contract and tort. These
4 claims would support both a “purposeful availment” and “purposeful direction”
5 analysis. Because both parties have focused exclusively on purposeful direction,
6 however, the Court will limit its analysis to whether Defendant purposefully
7 directed its activities toward Washington.

8 In deciding whether purposeful direction occurred, courts apply an “effects
9 test” derived from the Supreme Court’s decision in *Calder v. Jones*, 465 U.S. 783
10 (1984). This test “focuses on the forum in which the defendant’s actions were
11 felt,” regardless of whether the actions occurred within the forum. *Yahoo! Inc.*,
12 433 F.3d at 1206. To satisfy the effects test, the plaintiff must demonstrate that the
13 defendant “(1) committed an intentional act, (2) expressly aimed at the forum state,
14 (3) causing harm that the defendant knows is likely to be suffered in the forum
15 state.” *Mavrix Photo*, 647 F.3d at 1228 (quotation and citation omitted).

16 Defendant asserts that personal jurisdiction is lacking because Plaintiff
17 abandoned the so-called “Purchase Order” claim upon which the Court’s prior
18 personal jurisdiction ruling relied. ECF No. 103 at 7-9. At Plaintiff’s invitation,
19 the Court has compared the allegations asserted in the original Complaint to those
20 in the Amended Complaint. It is not clear from the face of either document that

1 the purchase order referenced in and attached to the original Complaint is for the
2 same equipment and/or services referenced in paragraphs 12, 20, 21, 31, 33, 41,
3 67, 75 and 82 of the Amended Complaint. In light of this uncertainty, the Court
4 will err on the side of caution and revisit the specific jurisdiction analysis anew
5 based upon the allegations in the Amended Complaint.

6 The Court concludes that personal jurisdiction has been properly established.
7 The Amended Complaint alleges that Defendant negotiated with Plaintiff and other
8 ClearTalk affiliates to repurpose defective or malfunctioning telecommunications
9 equipment for use in a network that would provide service to, *inter alia*, Plaintiff's
10 customers in Washington. Pl.'s Am. Compl., ECF No. 93, at ¶¶ 19-20. According
11 to Plaintiff, Defendant was directly involved in these negotiations and was aware
12 that the new network would extend to Washington. Pl.'s Am. Compl., ECF No.
13 93, at ¶¶ 22-24. Plaintiff further alleges that Defendant (or persons acting on its
14 behalf) affirmatively represented that the equipment in question (the primary
15 switch located in Jackson, Tennessee) could be fixed in time to accommodate
16 Plaintiff's anticipated launch date. Pl.'s Am. Compl., ECF No. 93, at ¶¶ 25-30. In
17 reliance upon these representations, Plaintiff proceeded to build out its portion of
18 the network. Pl.'s Am. Compl., ECF No. 93, at ¶¶ 31-34. During this process,
19 Plaintiff arranged to acquire forty (40) base stations manufactured by Defendant
20 which were needed to complete Plaintiff's portion of the network build-out:

1 [I]n order to facilitate the Washington build-out, one of the other
2 ClearTalk entities (“Daredevil, Inc.”) entered into an agreement
3 whereby ZTE Corp. would ship 40 base stations originally intended
for another market (St. Louis) to Yakima for use in the Washington
market.

4 * * *

5 ZTE and Daredevil intended Plaintiff to be a third party beneficiary of
6 the Addendum and, indeed, drafted the Addendum with Plaintiff’s
needs for the Yakima base stations in mind.

7 Pl.’s Am. Compl., ECF No. 93, at ¶¶ 35, 37. Plaintiff alleges that Defendant
8 breached this agreement by shipping “incomplete” base stations to Yakima. Pl.’s
9 Am. Compl., ECF No. 93, at ¶¶ 41, 43, 53. Plaintiff further asserts that it was
10 forced to abandon its network build-out after Defendant was unable to repair the
11 primary switch in Tennessee as promised. Pl.’s Am. Compl., ECF No. 93, at ¶¶
12 39-40.

13 The above allegations reflect purposeful direction of Defendant’s activities
14 toward Washington. Accepted as true, these allegations establish that Defendant
15 (1) entered into an agreement to repurpose its allegedly defective equipment for
16 use in a network that would extend to the State of Washington; (2) affirmatively
17 represented to Plaintiff, a Washington corporation, that the equipment would be
18 fixed in time to accommodate Plaintiff’s anticipated launch date; and (3) agreed to
19 ship—and did in fact ship—additional equipment needed to complete Plaintiff’s
20 portion of the network build-out to Washington. These were intentional acts that

1 were “expressly aimed” at Washington and which resulted in harm that Defendant
2 knew was likely to be suffered in Washington. *Mavrix Photo*, 647 F.3d at 1228.
3 Accordingly, all three elements of the effects test are satisfied. As the remaining
4 two elements of the three-part specific jurisdiction test are not contested, the Court
5 finds that personal jurisdiction over Defendant has been properly established.

6 **B. Failure to State a Claim**

7 A motion to dismiss for failure to state a claim tests the legal sufficiency of
8 the plaintiff’s claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To
9 withstand dismissal, a complaint must contain “enough facts to state a claim to
10 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
11 (2007). “Naked assertion[s],” “labels and conclusions,” or “formulaic recitation[s]
12 of the elements of a cause of action will not do.” *Id.* at 555, 557. “A claim has
13 facial plausibility when the plaintiff pleads factual content that allows the court to
14 draw the reasonable inference that the defendant is liable for the misconduct
15 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While a plaintiff need not
16 establish a probability of success on the merits, he or she must demonstrate “more
17 than a sheer possibility that a defendant has acted unlawfully.” *Id.*

18 A complaint must also contain a “short and plain statement of the claim
19 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This
20 standard “does not require detailed factual allegations, but it demands more than an

1 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at
2 678 (quoting *Twombly*, 550 U.S. at 555). In assessing whether Rule 8(a)(2) has
3 been satisfied, a court must first identify the elements of the plaintiff’s claim(s) and
4 then determine whether those elements could be proven on the facts pled. The
5 court should generally draw all reasonable inferences in the plaintiff’s favor, *see*
6 *Sheppard v. David Evans and Assocs.*, 694 F.3d 1045, 1051 (9th Cir. 2012), but it
7 need not accept “naked assertions devoid of further factual enhancement.” *Iqbal*,
8 556 U.S. at 678 (internal quotations and citation omitted).

9 Federal Rule of Civil Procedure 9(b) governs the pleading of allegations
10 involving fraud or mistake. In contrast to the more lenient standard set forth in
11 Rule 8(a)(2), Rule (9)(b) requires that a party “state with particularity the
12 circumstances constituting fraud or mistake” in his or her complaint. To satisfy
13 this standard, the allegations of fraud must “be specific enough to give defendants
14 notice of the particular misconduct so that they can defend against the charge and
15 not just deny that they have done anything wrong.” *Vess v. CibaGeigy Corp. USA*,
16 317 F.3d 1097, 1106 (9th Cir. 2003) (quotation and citation omitted). Thus,
17 “[a]verments of fraud must be accompanied by the who, what, when, where, and
18 how of the misconduct charged.” *Id.* (quotation and citation omitted). A party
19 may, however, plead allegations of “[m]alice, intent, knowledge, and other
20 conditions of a person’s mind” more generally. Fed. R. Civ. P. 9(b).

1 In ruling upon a motion to dismiss, a court must accept all factual allegations
2 in the complaint as true and construe the pleadings in the light most favorable to
3 the party opposing the motion. *Sprewell v. Golden State Warriors*, 266 F.3d 979,
4 988 (9th Cir. 2001). The court may disregard allegations that are contradicted by
5 matters properly subject to judicial notice or by exhibit. *Id.* The court may also
6 disregard conclusory allegations and arguments which are not supported by
7 reasonable deductions and inferences. *Id.*

8 The Ninth Circuit has repeatedly instructed district courts to “grant leave to
9 amend even if no request to amend the pleading was made, unless ... the pleading
10 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203
11 F.3d 1122, 1130 (9th Cir. 2000). The standard for granting leave to amend is
12 generous—the court “should freely give leave when justice so requires.” Fed. R.
13 Civ. P. 15(a)(2). In determining whether leave to amend is appropriate, a court
14 must consider the following five factors: bad faith, undue delay, prejudice to the
15 opposing party, futility of amendment, and whether the plaintiff has previously
16 amended the complaint. *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th
17 Cir. 2011).

18 1. Collective References to “ZTE”

19 Defendant argues that the Amended Complaint must be dismissed because it
20 improperly “lumps together” Defendant ZTE Corp. and Defendant’s non-party

1 subsidiary, ZTE USA. ECF No. 103 at 12-15. The thrust of this argument is that
2 Plaintiff should not be permitted to refer to these two entities collectively as “ZTE”
3 given that Plaintiff and ZTE USA are presently litigating factually related claims in
4 separate arbitration proceedings. “Unless [P]laintiff is required to distinguish
5 clearly between ZTE Corp. and ZTE USA,” Defendant argues, “it will be virtually
6 impossible for the parties, and this Court, to determine what, if any, claims remain
7 to be litigated following the arbitration result.” ECF No. 103 at 14.

8 The Court agrees that the Amended Complaint’s references to ZTE Corp.
9 and ZTE USA collectively as “ZTE” are somewhat problematic. One of the
10 central issues in this case is whether Plaintiff’s claims against ZTE Corp. arise
11 independently of its claims against ZTE USA in arbitration. Plaintiff maintains
12 that ZTE Corp. committed separate wrongs that give rise to separate liability.
13 Nevertheless, Plaintiff has occasionally grouped ZTE Corp. and ZTE USA
14 together in asserting its claims. For example, Plaintiff alleges:

15 39. Despite **ZTE’s** promises, it was unable to make the primary
16 switch located in Jackson, Tennessee functional. Plaintiff and its
17 affiliates worked tirelessly to attempt to resolve the issue, but to no
18 avail. As explained above, the Chinese engineers ZTE Corp. sent to
19 attempt to fix the equipment were unable to remedy the problems
20 within any time frame that was reasonable or workable. Even when
Plaintiff’s Tennessee affiliate, NTCH-WEST TENN, INC., engaged
third-party entities to specifically identify problems, the ZTE Corp.
engineers failed to implement, or were prevented from implementing,
the proposed solutions. In addition to other significant problems, the
Chinese engineers’ inability to fix the MMS and OTAF functions
were critically disruptive to Plaintiff’s planned operations.

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2 40. Ultimately, **ZTE** admitted that the Florida Equipment, now
3 located in Jackson, Tennessee, and critical to the functioning of the
4 remote Washington network, was not intended for commercial use,
5 had never been tested in the United States, and was merely a platform
6 for experimentation in the United States market. Without an operable
7 primary switch in Jackson, Plaintiff could not realize its Yakima
8 deployment plan.

9 41. Even if **ZTE** had been able to adequately repair the Jackson
10 network, **ZTE's** failure to deliver complete base stations made
11 deployment impossible. Specifically, of the 40 base stations allocated
12 to Washington pursuant to the Addendum, **ZTE** did not deliver any
13 complete units and, instead, shipped only partial components.

14 42. Plaintiff is informed and believes and thereon alleges that **ZTE**
15 hoped Plaintiff would begin its deployment and sink sufficient
16 resources into the development of the network before realizing the
17 deficiency, thus placing **ZTE** in a position to extract further
18 concessions from Plaintiff.

19 43. Indeed, when Plaintiff's South Carolina ClearTalk affiliate, which
20 was also allocated base stations pursuant to the Addendum, informed
ZTE that its base station shipment was incomplete, **ZTE** abruptly
reversed course and stated it would not be shipping any further base
stations to either Washington or South Carolina and that, the
Addendum notwithstanding, it had shipped all that it felt it owed to
the ClearTalk entities.

Pl.'s Am. Compl., ECF No. 93, at ¶¶ 39-43 (emphasis added). These references to
"ZTE" are ambiguous in that they do not allow the reader to determine whether the
actions in question were taken by ZTE Corp., ZTE USA, or both.

Nevertheless, the Court concludes that dismissal is not warranted. Despite
the ambiguity created by Plaintiff's occasional references to "ZTE," the remaining
allegations are "specific enough to give [Defendant ZTE Corp.] notice of the

1 particular misconduct so that [it] can defend against the charge[s] and not just deny
2 that [it has] done anything wrong.” *Vess*, 317 F.3d at 1106. If Defendant believes
3 that these ambiguities preclude it from asserting a meritorious defense such as res
4 judicata (claim preclusion) or collateral estoppel (issue preclusion), its remedy is to
5 file a motion for a more definite statement pursuant to Rule 12(e). *See* Charles A.
6 Wright, et al., 5B *Federal Practice & Procedure* § 1356 (December 2013 database
7 update) (“The Rule 12(b)(6) motion addresses itself solely to the question of
8 whether the complaint fails to state a claim . . . If the complaint is ambiguous or
9 does not contain sufficient information to allow a responsive pleading to be
10 framed, a motion under Rule 12(b)(6) is not appropriate; the proper remedy is a
11 motion for a more definite statement under Rule 12(e).”). Plaintiff has pled its
12 claims with sufficient particularity to satisfy Rules 8(a)(2) and 9(b); accordingly,
13 there is no basis for dismissal under Rule 12(b)(6).

14 2. Fraud and Negligent Misrepresentation Claims

15 Defendant contends that Plaintiff’s fraud and negligent misrepresentation
16 claims fail to satisfy Rule 9(b)’s heightened pleading requirement. ECF No. 103 at
17 15-16. The Court respectfully disagrees. As noted above, the allegations in the
18 Amended Complaint provide Defendant with adequate notice of the factual bases
19 for Plaintiff’s fraud and negligent misrepresentation claims. The Amended
20 Complaint specifically alleges that Defendant “inserted itself” into negotiations

1 between ZTE USA and several ClearTalk entities (including Plaintiff) to repurpose
2 an allegedly defective primary switch originally sold to PTA-FLA. Pl.'s Am.
3 Compl., ECF No. 93, at ¶¶ 19-22. During these negotiations, Defendant
4 affirmatively misrepresented its ability to fix the problems with the primary switch.
5 Pl.'s Am. Compl., ECF No. 93, at ¶¶ 23-28, 67. Even after it became apparent to
6 Defendant that the switch could not be rendered functional for its intended
7 purpose, Defendant continued to make false misrepresentations and fraudulently
8 induced Plaintiff to purchase additional equipment. Pl.'s Am. Compl., ECF No.
9 93, at ¶¶ 29-32, 71. The Court finds that these allegations are sufficiently
10 particular to put Defendant on notice of the factual bases for Plaintiff's fraud and
11 misrepresentation claims.

12 3. Breach of Contract Claim

13 Defendant moves for dismissal of Plaintiff's breach of contract claim,
14 arguing that Plaintiff has not plausibly alleged (1) that ZTE Corp. was a party to
15 the contract Addendum negotiated between Daredevil, Inc. and ZTE USA; or (2)
16 that Plaintiff was an intended beneficiary of the Addendum. ECF No. 103 at 16-
17 18. This argument is without merit. The Amended Complaint specifically alleges
18 that ZTE Corp.—rather than ZTE USA—was obligated to ship the 40 base stations
19 in question. Pl.'s Am. Compl., ECF No. 93, at ¶ 35. It further alleges that ZTE
20 Corp.'s Executive Vice President for North America, Zhu Jinyun, “reviewed and

1 approved the Addendum before it was executed.” Pl.’s Am. Compl., ECF No. 93,
2 at ¶¶ 35, 38. These allegations plausibly establish that Defendant was indeed a
3 party to the Addendum. Similarly, the Amended Complaint alleges that “ZTE and
4 Daredevil intended Plaintiff to be a third party beneficiary of the Addendum and,
5 indeed, drafted the Addendum with Plaintiff’s needs for the Yakima base stations
6 in mind.” Pl.’s Am. Compl., ECF No. 93, at ¶ 37. The Court must accept this
7 allegation as true at the pleading stage. *Sprewell*, 266 F.3d at 988. Accordingly,
8 Defendant’s motion to dismiss Plaintiff’s breach of contract claim is denied.

9 4. Tortious Interference With Contract Claim

10 Defendant argues that Plaintiff’s tortious interference with contract claim
11 fails as a matter of law because a corporate parent cannot be liable for interfering
12 with the affairs of its subsidiary where the entities’ economic interests are aligned.
13 ECF No. 103 at 18 (citing *Hansen v. Transworld Wireless TV-Spokane, Inc.*, 111
14 Wash. App. 361 (2002)). This argument has been raised prematurely. As Plaintiff
15 correctly notes, whether ZTE Corp.’s and ZTE USA’s economic interests were
16 aligned is a question of fact which is not susceptible to resolution on a motion to
17 dismiss. *See Hansen*, 111 Wash. App. at 373 (affirming dismissal of tortious
18 interference with contract claim where no evidence of divergent financial interests
19 had been presented on summary judgment). Defendant’s motion to dismiss is
20 denied as to this claim.

1 5. Promissory Estoppel Claim

2 Finally, Defendant contends that Plaintiff's promissory estoppel claim is
3 inadequately supported by the allegations in the Amended Complaint. ECF No.
4 103 at 19. Here again, the Court respectfully disagrees. There are five elements to
5 a promissory estoppel claim in Washington: (1) a promise which (2) the promisor
6 should reasonably expect to cause the promisee to change his position and (3)
7 which does cause the promisee to change his position (4) justifiably relying upon
8 the promise, in such a manner that (5) injustice can be avoided only by
9 enforcement of the promise. *Havens v. C & D Plastics, Inc.*, 124 Wash.2d 158,
10 171-72 (1994); accord *BancorpSouth Bank v. Paramount Properties, LLC*, 349
11 S.W.3d 363, 366 (Mo. App. 2011) ("A claim of promissory estoppel contains four
12 elements: (1) a promise; (2) on which a party relies to his or her detriment; (3) in a
13 way the promisor expected or should have expected; and (4) resulting in an
14 injustice that only enforcement of the promise could cure."). Each element has
15 been adequately pled. Plaintiff alleges that Defendant promised to fix the primary
16 switch in Tennessee and later promised to ship 40 complete base stations. Plaintiff
17 further alleges that it justifiably relied upon these promises to its detriment and that
18 Defendant should reasonably have expected it to do so. Given that this claim has
19 been pled in the alternative to Plaintiff's breach of contract claim, the fifth and
20 final element (enforcement of the promise to avoid injustice) is also satisfied; in

1 the event that Plaintiff cannot prove the existence of an enforceable contract, it
2 may seek to avoid injustice by holding Defendant to its promises.

3 **IT IS HEREBY ORDERED:**

4 Defendant's Motion to Dismiss (ECF No. 103) is **DENIED**.

5 The District Court Executive is hereby directed to enter this Order and
6 provide copies to counsel.

7 **DATED** February 27, 2014.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge